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No. 73-1997

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1973

Bernard Harrison, Petitioner

vs.

United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Bernard Harrison, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on the 4th day of June, 1974, and on the 12th day of March, 1974.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Seventh Circuit is unreported and is printed in Appendix A hereto at Page 1. The judgment of the Circuit Court of Appeals is also printed in Appendix A as is its Order of June 4, 1974, denying Petitioner's Petition for Rehearing. The case number assigned to

this case in the Circuit Court of Appeals for the Seventh Circuit is 73-1700.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 12, 1974. Rehearing was denied June 4, 1974. The jurisdiction of the Court is invoked under Title 28 United States Code, Section 1254 (1).

QUESTIONS PRESENTED

Questions presented by this Petition involve the decision of the Seventh Circuit Court of Appeals upholding the conviction of the petitioner in the United States District Court for the Northern District of Indiana, Hammond Division, of the offense of conspiracy to commit theft from an interstate shipment. Petitioner contends that the decision of the Circuit Court of Appeals has decided erroneously the following questions of federal law, which should be settled by this Court or conflict with the applicable decisions of this Court, to-wit:

> Did the government in charging the offense of conspiracy against the defendant adequately describe the conspiracy charge; Did the indictment inform the defendant as to with whom he is alleged to have conspired; Was there a fatal variance from the allegations of the indictment.

Petitioner alleges that either a fatal variance existed in this case or the government failed to adequately inform him within the meaning of the Constitution as to the nature of the offense with which he was charged and that the decision of the Court of Appeals contravenes ruling precedence of this Court and is in conflict with the decisions of the Fifth Circuit Court of Appeals.

STATUTES INVOLVED

The following statutes of Constitutional provisions are involved in the questions presented, to-wit:

Amendment 5, United States Constitution
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6, United States Constitution
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an im-

partial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 18, United States Code, § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Rule 7 Federal Rules of Criminal Procedure

STATEMENT OF THE CASE

Petitioner was charged as a defendant by means of an indictment filed September 23, 1971, and was charged with the criminal offense of conspiracy as defined by Title 18, United States Code, Section 371. The indictment was returned in the United States District Court for the Northern District of Indiana, Hammond Division. The nature of the conspiracy

was alleged to be a confederation to commit a theft from a shipment of goods traveling in interstate commerce. Petitioner filed several pre-trial motions including a Motion to Dismiss, a Motion for a Bill of Particulars; and a Motion for Discovery and Inspection. The Motion to Dismiss and the Motion for a Bill of Particulars were denied by the Court.

After a bench trial on February 15, 1973, the trial Court entered its finding of guilty on April 17, 1973. Petitioner took his appeal to the Court of Appeals for the Seventh Circuit and the Seventh Circuit affirmed the decision of the trial Court.

Petitioner has been permitted to remain at liberty on bail pending resolution of his appeal.

REASONS FOR GRANTING THIS WRIT

Petitioner herein was charged by way of indictment which said indictment is set forth in Appendix A at Page 7. It is petitioner's contention that the evidence in this cause proved a conspiracy other than the one charged in the indictment. Petitioner also addends to this Petition a copy of the trial Court's opinion for the Court's edification.

A FATAL VARIANCE EXISTED BETWEEN THE INDICTMENT AND THE PROOF IN THIS CAUSE. PETITIONER HAS BEEN CONVICTED OF AN OFFENSE WITH WHICH HE WAS NOT CHARGED.

Petitioner joins under this heading both the variance issue and the issue relating to the denial of his pre-trial motions for the reason that both issues involve the failure to adequately inform petitioner of the nature of the conspiracy alleged and the denial of his pre-trial motions compounded the effect of the variance between the proof and the pleading.

A. The Function of an Indictment is to Inform the Defendant with Sufficient Particularity so that He May Make his Defense and Assert his Conviction or Acquittal as Protection against Subsequent Prosecution.

Russell v. U.S., 369 U.S. 749; 82 S.Ct. 1038; 8 L.Ed.2d. 240, (1962)

Gaither v. U.S., 413 F.2d. 1061; 134 U.S.App.D.C. 154 (1969)

Rule 7, Federal Rules Criminal Procedure

B. A Conspiracy Indictment Cannot Be Aided in its Necessary Allegations by Reference to the "Overt Acts."

U.S. v. White, 69 F.S. 562, (1948)

Nelson v. U.S., 406 F.2d. 1136

Defendant Harrison was indicted along with defendant Robert Yungen and defendant John Hoagland in this cause. The only reference to any other persons involved in the alleged conspiracy is the phrase in the indictment "and diverse other persons." The evidence in the cause, if it establishes a conspiracy at all, does not establish a conspiracy by and between petitioner Harrison and the other two named co-conspirators. There is no evidence to reflect any agreement of any kind by and between defendant Harrison and the other named co-conspirators. The indictment is also totally misleading in that it avers in the portion beginning "The said conspiracy was to be established in the following manner and by the following means:" that petitioner Harrison conspired with co-defendant Yungen to divert the truckload of steel and that he was to pay defendant Yungen for said truckload. In the portion of the indictment referring to overt acts, the indictment refers to a conversation between defendant Yungen and defendant Harrison arranging for delivery of the load of steel. The indictment further refers in said section to payment by defendant Harrison to defendant Yungen of the sum of $1,500.00. At no place in the indictment is there any direct or indirect reference, other than the standard clause above noted, that the actors in the conspiracy were any persons other than the named defendants.

C. Where One Conspiracy is Charged and Another Proved a Fatal Var-

iance Exists.

Harlow v. U.S., 301 F.2d. 361, (1962) CA Tex.

However, the evidence submitted in this cause reflects the fact that no conspiracy was proven between petitioner Harrison and the other named defendants and that assuming arguendo that a conspiracy was proven at all it was a conspiracy with Gene Kuyrkendall, the Government informant. The trial court in its Memorandum Opinion takes refuge in the phrase "diverse other persons," stating that because Harrison had access to the Government's file, he was adequately informed as to the true nature of the charge. The Government in its response does not deny a variance but simply states that the variance was not material or prejudicial.

D. Actual Surprise is Not Necessary for Fatal Variance. Issue is Whether there is a Substantial Possibility that Counsel Will be Unable to Meet Proof Consistent with Charges Contained in Indictment.

U.S. v. Lippi, 193 F.Supp, 441, D.C.Del. (1961)

However, it must be noted that defendant filed a Motion for Bill of Particulars which was denied by the court and in said Motion requested that the Government be required to state the name and address of the diverse other persons with

whom defendant Harrison was alleged to have conspired, along with a number of other facts. It is further apparent that the Grand Jury must have had knowledge of the existence of conspirator Kuyrkendall, since it was he who arranged the transaction at issue and it was he who cooperated with the F.B.I. in arranging for the theft and delivery of the steel. It would appear that the trial court's position and that of the Government amounts to an argument that the Goverment is entitled to allege anything it wishes with respect to a conspiracy in an indictment and so long as it uses the phrase "diverse other persons" the defendant is adequately protected. When the indictment is read as a whole, nowhere does it appear that there is any involvement by such "diverse other persons" either in the alleged overt acts or in that portion of the indictment setting forth manner and means of accomplishment.

E. Variance Occurs when Indictment is Left Unaltered but Evidence Proves Materially Different Facts.

Gaither v. U.S., 413F.2d. 1061; 134 U.S. App.D.C. 154, (1969)

Pearlman v. U.S., 20 F.2d. 113

Defendant maintains that an indictment is meant to inform a defendant of the charge which he is required to meet and that where the Government deliberately mis-states the facts in said charge as in the instant case, a fatal variance

exists. That the other function of an indictment is to protect a defendant against being placed twice in jeopardy for the same offense and that on the basis of the instant indictment, there is nothing to prevent petitioner from being tried again for a conspiracy with the Government's informant Gene Kuyrkendall.

Although in accordance with the court's order on defendant's Motion for Discovery, the Government did reveal the participation of the unindicted and unnamed (in the indictment) informant Kuyrkendall, this of and by itself did not inform this defendant that the Government intended to abandon the whole theory of the indictment which alleges a conspiracy between petitioner and co-defendants Hoagland and Yungen, and nowhere mentions directly or by implication the participation of the said Kuyrkendall.

It has been established that where one conspiracy is charged and another conspiracy is proven, that a fatal variance for failure of proof exists. This case is to be distinguished from those cases charging one conspiracy and proving two where the defendant is involved in both, and from those cases where the unnamed conspirator is unknown.

In view of the manner in which the evidence in this cause revealed the nature of the alleged conspiracy, it was in fact prejudicial and harmful to the defendant to deny his Motion for Bill of Particulars and Motion to Dismiss.

This is especially true because of the fact, as above set forth in argument, that the indictment did not inform the petitioner Harrison as to the true nature of the conspiracy alleged and adequately inform him of the participation of informant Kuyrkendall so that the indictment in and of itself was totally misleading as to the nature of the evidence which the Government intended to produce.

The Trial Court in its Memorandum Opinion admits the existence of the variance but states that it was not material. In view of the evidence in this cause, petitioner states that the indictment was totally misleading and fails to protect him from subsequent jeopardy.

United States Constitution Amendment 5
United States Constitution Amendment 6

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued December 4, 1973
March 12, 1974

Before

Hon. Luther M. Swygert, Chief Judge
Hon. Roger J. Kiley, Senior Circuit Judge
Hon. Omer Poos, Senior District Judge*

UNITED STATES OF AMERICA,	)Appeal from the
	)United States
Plaintiff-Appellee,	)District Court
	)for the North-
No. 73-1700 vs.	)ern District of
	)Indiana, Ham-
BERNARD HARRISON,	)mond Division.
	)No. 71-H-CR-121
Defendant-Appellant	)GEORGE N.
	)BEAMER, Judge.

O R D E R

Defendant Harrison was convicted, at a bench trial, of conspiracy, 18 U.S.C. §371, with two named persons and "diverse other persons" to steal merchandise, valued in excess of $100.00, from an interstate shipment, inviolation of 18 U.S.C. §659. He has appealed. We affirm.

* Senior District Judge Omer Poos of the Southern District of Illinois sitting by designation.

The indictment outlined the alleged conspiracy: Yungen was to steal a truck trailer of steel from Youngstown Sheet and Tube Company in Indiana, consigned to General Electric (G.E.) in Kentucky, and transport it to a place Harrison designated. Harrison was to accept delivery and pay Yungen for the steel. Hoagland, an employee of G.E. in Kentucky, was to falsify receipt of the steel there.

The conspiracy was allegedly carried out in overt acts, when an arrangement was made on July 30, 1971, that Yungen, driver for Youngstown's carrier, was to pick up the steel and at Harrison's direction to deliver it, not to the consignee G.E., but to Chicago where Harrison accepted delivery.

After delivering the July 30 load, Yungen drove to Indiana where he was arrested. The arrests of the others, and the trial, conviction and this appeal followed.

I.

Harrison contends the evidence is insufficient to support the district court's findings that he had knowledge of, and participated in, the conspiracy, or that the steel was stolen from an interstate shipment. Taking the evidence most favorable to the government, we find no merit in the contention.

Gene Kuyrkendall[1] had, before July 30, unlawfully taken ten or twelve loads, consigned to G.E., to Kedvale Steel Company in Chicago, for Harrison. Each

time Harrison paid him $1,500.00. He falsified bills of lading provided by Harrison. In January, 1971, Harrison asked "Where are you grabbing the stuff?" Kuyrkendall told him of the arrangement he had with a man at G.E. who would cover the transaction. On July 28 he delivered a stolen load to Harrison and in the presence of Yungen Harrison gave Kuyrkendall $1,500.00. Yungen received $500.00 from Kuyrkendall for the load to be stolen and delivered July 30. Hoagland also received $500.00.

The district court's findings with respect to Harrison's knowledge and participation in the conspiracy, United States v. Hickey, 360 F.2d 127, 138 (7th Cir. 1966), and the interstate character of the shipment, Nassif v. United States, 370 F.2d 147, 153 (8th Cir. 1966), have ample support in circumstantial evidence in the record. Harrison's reliance upon United States v. Cimini, 427 F.2d 129 (6th Cir. 1970), does not support his argument that the proof failed to show his knowledge of the interstate character of the shipment. Harrison knew Youngstown was in Indiana and that the load was "Youngstown stuff."

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1 Kuyrkendall, unnamed in the indictment but a co-conspirator, was a principal government witness. Yungen and Hoagland pleaded guilty. Yungen was also a government witness.

II.

A.

Harrison contends that there is a fatal variance between the indictment and proof because the indictment charges Harrison conspired with Yungen and Hoagland, but that the proof, if it shows any conspiracy, could show only a conspiracy with Kuyrkendall.

The district court found that Kuyrkendall came within the term "diverse other persons" alleged to have conspired with Yungen, Hoagland and Harrison. The decision in Harlow v. United States, 301 F.2d 361 (5th Cir. 1962), cited by Harrison, is distinguishable on the facts. See p. 369. The proof of Harrison's conspiring with Yungen and Hoagland, as well as Kuyrkendall, has ample evidentiary support.

B.

Harrison argues that the court erred in denying his pre-trial motion for a bill of particulars to learn the names and addresses of the "diverse other persons." It is conceded that, as the court found, the government file shows that Kuyrkendall was considered a conspirator and that the file was made available to Harrison before trial. The court did not, under the circumstances abuse its discretion in denying the motion. We reject the Harrison argument.

III.

Was Harrison entrapped as a matter of law, as he contends? We think not.

Kuyrkendall was the government informer. He was neither arrested for, nor charged with the theft before us. At the time he was serving the agents in the instant unlawful enterprise, he had been charged with, and pleaded guilty to, theft from another interstate shipment and had already been given probation. Prior to the theft before us, he had agreed to cooperate with the F.B.I. He told the F.B.I. agents about the ten or twelve thefts from Youngstown of consignments to G.E. He informed them of the details of the instant offense. The F.B.I. set up surveillance and in the morning of July 30 followed Kuyrkendall's car which followed Yungen's truck -- after the two had met following Yungen's theft of the load.

Harrison denied commission of the offense. Normally an entrapment defense is based on a confession and avoidance theory and not available where the offense is denied. Sendejas v. United States, 428 F.2d 1040, 1044 (9th Cir. 1970). But if substantial evidence of entrapment appears in the government proof, the defense may in some cases be invoked. Id. The question is whether the government's evidence shows that the design of the offense originated with the F.B.I. and Kuyrkendall and was implanted in the mind of "innocent" Harrison who was not otherwise predisposed

to participate in the conspiracy. Id.

The district court found that the conspiracy between Kuyrkendall and the three named co-conspirators had been in existence for at least three months before the instant theft, and that Kuyrkendall merely offered Harrison the opportunity to participate in the conspiracy. That finding is supported by the record.

Finally, Harrison contends that the court erred in permitting Kuyrkendall to testify as to his conversations and dealings, with Harrison, which preceded the dates of the alleged conspiracy. We find no error. It would have been better practice to allege the beginning of the conspiracy in January rather than in July, 1971. But the testimony was relevant to show Harrison's state of mind in January and bears on his disposition at the time of the alleged offense. United States v. Del Purgatorio, 411 F.2d 84 (2nd Cir. 1969).

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 4, 1974

Before

Hon. Luther M. Swygert, Chief Judge
Hon. Roger J. Kiley, Sr. Circuit Judge
Hon. Omer Poos, Sr. District Judge

UNITED STATES OF AMERICA,	)Appeal from the
	)United States
Plaintiff-Appellee,	)District Court
	)for the North-
No. 73-1700 vs.	)ern District of
	)Indiana, Ham-
BERNARD HARRISON,	)mond Division.
	)(71 H CR 121)
Defendant-Appellant	)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA	) 71 H CR 121
v.	)
BERNARD HARRISON	) Title 18 U.S.C.
ROBERT EUGENE YUNGEN	) S 371 and 659
JOHN CLEM HOAGLAND	)

INDICTMENT

The Grand Jury charges:

From on or about the 9th day of July, 1971, and continuously thereafter up to and including the 31st day of July, 1971 in the Northern District of Indiana and elsewhere, BERNARD HARRISON, ROBERT

EUGENE YUNGEN and JOHN CLEM HOAGLAND, defendants, willfully and knowingly did combine, conspire, confederate and agree together with each other and diverse other persons to commit the following offense against the United States, to-wit: to unlawfully and with intent to convert to their own use, embezzle, steal, take or carry away from an interstate shipment of freight, goods and chattels of a value in excess of $100.00, that is, two bundles of sheet steel weighing approximately 42,250 pounds, in violation of Title 18, United States Code, Sections 371 and 659.

The said conspiracy was to be accomplished in the following manner and by the following means:

(a) The defendant Robert Eugene Yungen was to steal a truck trailer loaded with sheet steel from the Youngstown Sheet and Tube Company, East Chicago, Indiana.

(b) The defendant Robert Eugene Yungen was to transport the truck trailer to a location other than its destination of Louisville, Kentucky, such location to be designated by defendant Bernard Harrison.

(c) The defendant Bernard Harrison was to take delivery of this trailer and steel, and pay defendant Robert Eugene Yungen for it.

(d) The defendant John Clem Hoagland was to falsely certify on the shipping documents at Louisville, Kentucky, that the shipment was delivered to its proper destination.

In furtherance of the conspiracy and

to effect the objects thereof, the defendants performed the following overt acts:

1. On or about the 29th day of July, 1971, defendant Robert Eugene Yungen had a conversation with defendant Bernard Harrison during which conversation arrangements were made for defendant Bernard Harrison to accept delivery of a load of steel at a place to be designated, which load of steel defendant Robert Eugene Yungen was to steal.

2. Later on this same 29th day of July, 1971, defendant Robert Eugene Yungen stole in Lake County, Indiana, two bundles of steel from a shipment by the Youngstown Sheet and Tube Company, from East Chicago, Indiana, to Louisville, Kentucky.

3. On or about the 30th day of July, 1971, defendant Robert Eugene Yungen delivered said steel to the place designated by defendant Bernard Harrison at Chicago, Illinois.

4. At the time of delivery on or about the 30th day of July, 1971, defendant Bernard Harrison accepted said steel and paid defendant Robert Eugene Yungen the sum of $1500.00.

5. On or about the 30th day of July, 1971, defendant John Clem Hoagland falsely certified the delivery of the said shipment of steel to General Electric Corporation at Louisville, Kentucky and received $500.00 from the $1500.00 payment made by the defendant Bernard Harrison.

A True Bill

/s/ Julius J. Valberg
Foreman

/s/ William C. Lee
William C. Lee
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA)
v) CIVIL NO.
BERNARD HARRISON, et al.) 71 H CR 121

TRIAL COURT'S OPINION

O R D E R

This case came on for trial before the Court without a jury, a jury having been waived by the defendant, on February 15, 1973. Upon submission of all the evidence, the Court took the case under advisement and ordered the parties to submit briefs on the various questions raised.

Upon consideration of the evidence introduced at the trial and the briefs of both parties, the Court finds the defendant, Bernard Harrison, GUILTY as charged in the indictment.

Entered this 17th day of April, 1973.

/s/ George N. Beamer
George N. Beamer
U.S. District Judge

MEMORANDUM

Defendant Bernard Harrison was charged in a one count indictment with co-defendants, Robert Yungen and John Hoagland with conspiracy under 18 U.S.C. S. 371 to steal from an interstate shipment of freight, goods and chattels of a value in excess of $100.00, namely two bundles of sheet steel weighing approximately 42,250 pounds, in violation of 18 U.S.C. S. 659. The indictment named as co-conspirators the three named defendants and "diverse other persons."

The general outlines of the conspiracy, as alleged in the indictment, called for defendant Yungen to steal a trailer of sheet steel from Youngstown Sheet & Tube Co. in East Chicago, Indiana. He would then transport this steel to a location other than its proper destination in Louisville, Kentucky, such destination to be designated by defendant Harrison. Defendant Harrison was to take delivery of the steel and pay Yungen. At the time defendant Hoagland was to falsely certify on the shipping documents at Louisville, Kentucky, that the steel was delivered to its proper destination. The indictment further alleges five overt acts which were performed by the defendants in furtherance of the objects and purposes of the conspiracy.

At the trial evidence was introduced to show that on July 29, 1971, defendant Yungen picked up a load of sheet steel weighing 45,250 pounds from Youngstown Sheet & Tube Co., East Chicago, Indiana, which was destined for General Electric Company in Louisville, Kentucky. After picking up this load, defendant Yungen got in touch with a Mr. Eugene Kuyrkendall at a bar in Gary, Indiana. In the presence of defendant Yungen, Mr. Kuyrkendall called defendant Harrison who told Kuyrkendall to take the load of steel to Kedvale Steel Company in Chicago, Illinois. After this call defendant Yungen drove the trailer with the steel to Kedvale Steel Company while Mr. Kuyrkendall followed in his car. The steel was unloaded there and defendant Harrison paid Kuyrkendall $1,500.00 for the load and Kuyrkendall paid Yungen approximately $500.00 for his part in the scheme. This particular load was cold roll prime steel having a market value of approximately $4,500.00. Mr. Kuyrkendall then took the bills of lading and shipping tags to Louisville, Kentucky to Hoagland and paid him for certifying that the steel was received there.

The evidence that this transaction occurred pursuant to a conspiracy among the defendants came primarily from the testimony of Mr. Kuyrkendall supported by that of defendant Yungen. Mr. Kuyrkendall testified that he had been acquainted with all three defendants for some time prior to July 1971. Mr. Kuyrkendall had a deal with defendant Hoag-

land, who was a steel receiving clerk in the receiving and processing department of General Electric in Louisville, Kentucky. Under this arrangement, Hoagland would show on the General Electric records that shipments of steel were actually received whenever Kuyrkendall could divert a load of steel destined for General Electric to another place. Mr. Kuyrkendall would bring the bills of lading to Hoagland who could sign them for General Electric's records. Mr. Kuyrkendall also had made an arrangement with defendant Yungen, a truck driver, that whenever he was to pick up and haul a shipment of steel at Youngstown Sheet & Tube Co. to General Electric Co. in Louisville, Kentucky, Yungen could contact him and Kuyrkendall could have it diverted and sold elsewhere.

The evidence relating defendant Harrison to this scheme is also found in Mr. Kuyrkendall's testimony. He states that he had sold ten or twelve loads of steel to defendant Harrison in the past. Defendant Harrison would pay him $1,500.00 a load. Mr. Kuyrkendall testified that on these prior occasions he would meet Harrison who would either give him a set of bills of lading or Kuyrkendall would make them out himself. When Kuyrkendall would make out the bills, Harrison would give him blank forms on Delta Steel Company of Detroit, Michigan. These transactions were always in cash with no receipts. Mr. Kuyrkendall also testified that on one occasion defendant Harrison asked him where he was grabbing all this

stuff. Mr. Kuyrkendall answered that he had an arrangement with a man in General Electric who was "covering" it. Mr. Kuyrkendall testified that he never delivered any legitimate loads to defendant Harrison.

Defendant Yungen testified to only delivering two or three loads to Kedvale Steel Co. in Chicago. He testified that he did not see Harrison at Kedvale on July 29th but that on a prior occasion he was with both Kuyrkendall and Harrison on the receiving dock. On that occasion, Harrison gave Kuyrkendall an envelope from which Kuyrkendall later took $500.00 to pay him for delivering the steel.

Defendant Harrison testified that he did not know that the steel bought from Kuyrkendall was stolen. However, he did admit to buying two loads of steel from Kuyrkendall and receiving no papers from him either time.

From the above evidence defendant Harrison argues that no conspiracy was proven between himself and the other named defendants as alleged in the indictment. Harrison contends that he dealt only with Kuyrkendall and that Yungen and Hoagland dealt only with Kuyrkendall and that there was no contact between himself and the other named defendants. On this basis, defendant Harrison concludes that, while charged with two other defendants with conspiracy, the proof shows, if anything, his implication with Kuyrkendall only, a person not named in the indictment.

In the first place, the indictment does not charge just Yungen, Harrison and Hoagland with conspiracy. The indictment names these three and "diverse other persons." In this case Mr. Kuyrkendall was one of these "other persons" referred to in the indictment. It is well settled that an indictment does not have to name all the conspirators known to the grand jury to be involved in the conspiracy. United States v. Gasoline Retailers Association, Inc., 285 F.2d 688 (7th Cir. 1961); United States v. Melekh, 193 F.Supp. 586 (N.D. Ill. 1961); Jones v. United States, 11 F.2d 98 (4th Cir. 1926). Nor can defendant Harrison claim that he was surprised or prejudiced by the omission of Mr. Kuyrkendall's name from the indictment. The Government file and the record amply shows that Mr. Kuyrkendall was considered a participant and co-conspirator in the offense alleged. This material was made available to the defendant prior to the trial. Therefore, Mr. Kuyrkendall's presence and testimony at trial concerning his own and Harrison's role in the offense charged could come as no surprise to defendant Harrison.

Defendant Harrison's claim that he will not be protected from further jeopardy of a charge of conspiracy between himself and Kuyrkendall is also without merit. The rule is that not only the indictment but also the entire record of the proceedings can be referred to if there is a later claim of double jeopardy. Russell v. United States, 369 U.S. 749, 8 L.Ed.2d 240 (1962). In the present case the entire record of proceedings would

adequately protect defendant Harrison from further prosecution.

However, the primary issue raised by defendant Harrison's argument is the sufficiency of proof that he was involved in the conspiracy charged in the indictment. The central element in a conspiracy is an agreement among two or more persons to achieve an overall goal or common purpose --- in this case to steal goods from a shipment in interstate commerce. The crime of conspiracy is complete upon the proof of the agreement and at least one overt act committed by one of the co-conspirators in furtherance of the objectives of the conspiracy. United States v. Fellabaum, 408 F.2d 220 (7th Cir. 1969).

In the present case there is ample evidence of a conspiracy between Kuyrkendall, Yungen and Hoagland to have shipments of steel from Youngstown Sheet & Tube Company destined for General Electric Company in Louisville, Kentucky, diverted to Kedvale Steel Company for sale. Mr. Kuyrkendall testified to an agreement to this effect with both Yungen and Hoagland and Yungen corroborated that part of Kuyrkendall's testimony relating to him. While it is apparent that neither Yungen nor Hoagland knew all the details of the operation, it is also apparent that they knew and understood its essential operation.

There is little direct evidence that defendant Harrison was part of this con-

spiracy. However, "a conspiracy may be and usually is established by circumstantial evidence; by inferences from the evidence of the relationship of the parties and by overt acts, conduct and other probative circumstances." Isaacs v. United States, 301 F.2d 706, 724 (8th Cir. 1962). In this case the circumstantial evidence is sufficient to establish defendant Harrison as a member of a single conspiracy with Kuyrkendall and the other named defendants.

Mr. Kuyrkendall's testimony indicates that he was giving Harrison loads of cold roll prime steel with a market value of over $4,000.00 for the price of $1,500.00 per load. Mr. Kuyrkendall indicated that papers on this steel were either made out by himself or supplied by defendant Harrison on a Delta Steel Co. of Detroit, Michigan. Defendant Harrison questioned Kuyrkendall on a prior occasion as to the source of this steel asking him, "where he was grabbing all of this stuff" to which Kuyrkendall replied that he had an arrangement with a man at General Electric who was covering it. Mr. Kuyrkendall testified that he never delivered any legitimate loads to Harrison. He also testified to delivering ten to twelve loads to Harrison; Yungen testified to two or three loads, and Harrison himself testified to receiving at least two loads. From this evidence there can be little doubt that Harrison knew on July 29, 1971, that the steel he was getting was stolen.

Defendant Harrison argues that this at most would show a conspiracy with Kuyrkendall and that because he had no communication or contact with either Yungen or Hoagland, he could not be a part of a conspiracy with them. On this point the law is clear that while "the parties to the agreement must know of each other's existence, they need not know of each other's identity nor need there be direct contact." United States v. Varelli, 407 F.2d 735, 742 (7th Cir. 1969). "It is also not necessary that the defendant have knowledge of each and every detail of the plan; it is enough that he know if its essential nature." Fellabaum, supra at 224. The facts show that Kuyrkendall informed Harrison of a man (Hoagland) at General Electric and his role in covering the loss of steel there. Harrison had also been in the company of Yungen and Kuyrkendall on the receiving dock of Kedvale Steel Company on the occasion of a prior shipment. Therefore, Harrison undoubtedly knew of the existence of Yungen and Hoagland, although he may have not known them by name. He would also know of the general role that Hoagland played at General Electric although not the specifics of how the loss was being covered up, and the role that Yungen, as a truck driver, would have to play. With knowledge that he was dealing with stolen steel through Kuyrkendall and that two other persons were involved through Kuyrkendall, Harrison bought the steel and helped in making out the papers. In doing so, defendant thus allied himself with the others in a common venture to make the theft ultimately successful by

reselling the steel on the market. With knowledge of the existence of Yungen and Hoagland and the essential nature of the scheme, it serves defendant Harrison little to say that he only participated overtly through Kuyrkendall. As was aptly noted "(once there is satisfactory proof that a conspiracy has been formed, the question of a particular defendant's connection with it may be merely a matter of whether the stick fits so natural into position in the fagot as to convince that it is a part of it.)" Isaacs, supra at 725.

The final proof to establish a conspiracy is that an overt act was committed by one of the conspirators in furtherance of the objects and purposes of the conspiracy. All that is necessary is one overt act since the act of each conspirator is the act of all. United States v. Vittoria, 284 F.2d 451 (7th Cir. 1960).

The indictment specified five overt acts performed by the defendants. At least three of these were established by the evidence. The evidence showed that defendant Yungen stole the two bundles of steel destined for Louisville, Kentucky, from Youngstown Sheet & Tube Company in East Chicago, Indiana. The evidence also showed that Yungen delivered this steel to Kedvale Steel Company in Chicago, Illinois, which was the place designated by defendant Harrison. There is also evidence that defendant Hoagland certified that these loads were received in Louisville, Kentucky, when, in fact, they were

not. Although two additional overt acts were alleged in the indictment and were not proven at trial, this is not fatal to the case. It is well settled that it is not necessary to prove each of the overt acts alleged and proof of only one is needed although several are charged. Vittoria, supra; Hall v. United States. 109 F.2d 976 (10th Cir. 1960).

However, the fact that there was a variance between various facts alleged in the indictment and the proof at trial raises the issue of whether this variance is fatal to a conviction. Rule 52(a), F.R.Crim.P., provides that "any..... variance which does not affect substantial rights shall be disregarded." The test of whether a variance affects such rights is whether the charge apprised the defendant of what he must meet at trial and protect him against further jeopardy and whether the variance from this charge was such as to have surprised the defendant at the trial to his injury. United States v. Crowder, 346 F.2d 1 (6th Cir. 1964), and cases cited therein. In the present case the variance involves the allegations in the indictment that defendant Harrison had a conversation with Yungen on July 29, 1971, to make arrangements for the delivery of the stolen steel and that on July 30, 1971, defendant Harrison accepted the steel and paid Yungen $1500.00. The proof at trial showed that the conversation alleged was between defendant Harrison and Kuyrkendall over the phone, although Yungen was present with Kuyrkendall at the time, and that on July 30, 1971, Yungen

had already delivered the steel and left before defendant Harrison accepted the steel from Kuyrkendall and paid him.

The Court is of the opinion that this variance has not affected substantial rights of defendant Harrison. In the first place, the indictment named not only the three defendants, but also "diverse other persons." From this defendant Harrison could be fully apprised that more people were involved than those actually named. The fact that Kuyrkendall was also one of the conspirators and in all probability the major conspirator is apparent not only from the record but also from the Government's file which was available to the defendant in its entirety. Based on this, defendant Harrison was fully apprised prior to trial that his implication in the conspiracy, if any, could be through the named defendants or Kuyrkendall. On this point defendant Harrison cannot claim surprise. In addition, as previously mentioned, defendant Harrison is amply protected from further jeopardy by the evidence of Kuyrkendall's role in the conspiracy which was adduced at trial.

The final argument raised by defendant Harrison as grounds for acquittal is that he was entrapped by Kuyrkendall, acting as an agent of the Government, into committing the offense charged. Since defendant Harrison has denied the commission of the crime charged, the scope of the Court's inquiry is whether the Government's own evidence establishes en-

trapment as a matter of law. Sendejas v United States, 428 F.2d 1040 (9th Cir. 1970), cert denied 400 U.S. 879, 27 L. Ed.2d 116. Defendant Harrison points to the Government's evidence that Kuyrkendall was under indictment for theft from an interstate shipment prior to July, 1971, and in return for certain agreements as to the disposition of the case and his prosecution in the present case Kuyrkendall agreed to help the Government obtain evidence against the three named defendants which became the basis for the present prosecution. Defendant Harrison points to the testimony of Kuyrkendall that he approached Harrison concerning the sale of the steel on July 29 and 30, 1971, and therefore, Kuyrkendall was the instigator of the commission of the offense. In addition, defendant Harrison contends that the Government failed to sufficiently prove that Harrison had a pre-existing disposition to participate in a conspiracy, which is its burden to prove upon a showing of Government inducement to commit the offense.

However, the fact that Kuyrkendall was working for the government when he contacted defendant Harrison on July 29, 1971, and had arranged for agents of the F.B.I. to follow this shipment of stolen steel does not constitute entrapment as a matter of law under the circumstances of this case. The test of whether entrapment is established as a matter of law is whether "the criminal design for the crime charge originated with government officials (or agents) and was im-

planted in the mind of an innocent person so that he was induced to commit a crime that he was not otherwise predisposed to commit." Sendjas, supra at 1044. In the present case there is ample evidence to show both that the conspiracy was already present at the time that Kuyrkendall agreed to assist the Government and that defendant Harrison was already predisposed towards participation in it. Kuyrkendall testified that ten to twelve loads of steel had been stolen and marketed through defendant Harrison and that they had an agreed price of $1,500.00, well below the market price for the quantity and quality of steel involved. Defendant Yungen testified to knowing Harrison through Kuyrkendall for some six months prior to July, 1971, and had delivered two or three loads before, thus establishing the inference that this conspiracy was of some duration. As early as January, 1971, defendant Harrison had questioned Kuyrkendall about the source of his steel and Kuyrkendall had told him of his arrangements at General Electric. This evidence is sufficient to show not only that defendant Harrison already had a criminal design towards this conspiracy by July, 1971, but also that he had a pre-disposition to participate.

The record also fails to show that the Government's participation in the July 29, 1971, transaction was so great as to be "shocking to (the) sense of justice." United States v. McGrath (7th Cir. September 26, 1972). In facts, its participation was minimal. The evidence

shows that Yungen came to Kuyrkendall on July 29th with the shipment of steel. Kuyrkendall then contacted defendant Harrison to inform him that he had a shipment of steel available. Defendant Harrison indicated that he wanted the steel delivered to Kedvale Steel Company. In contacting Harrison, Kuyrkendall was only affording defendant Harrison an opportunity to participate in the conspiracy as the evidence indicates he had in the past. It has been held that "the fact that Government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment." Sherman v. United States, 356 U.S.369, 372 (1958). On the basis of the above conclusions, the Court is of the opinion that defendant Harrison was not entrapped into committing the offense of conspiracy as charged in the indictment.

AFFIDAVIT OF SERVICE

I, SHELDON H. COHAN, an attorney in the office of Cohan and Cohan, attorneys of record for Bernard Harrison, petitioner herein, depose and say that on July 5, 1974, I served a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on the United States of America, respondent herein, by mailing three copies thereof, in a duly addressed envelope, with first class airmail postage prepaid to the Solicitor General, counsel for said respondent, at Department of Justice, Washington, D.C., 20530.

Sheldon H. Cohan
SHELDON H. COHAN

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

Subscribed and sworn to before me, a notary public, this 5th day of July, 1974.

Maria Chakos
Maria Chakos,
Notary Public

My Commission Expires:
March 8, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1997

BERNARD HARRISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of conspiring to steal a shipment of steel from interstate commerce, in violation of 18 U.S.C. 371 and 659.[1] He was sentenced to a term of three years' imprisonment (all but six months of which was suspended), placed on probation for two and one half years, and fined $5,000. The court of appeals affirmed in an unpublished order (Pet. App. A, pp. 1-6).

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[1]The two co-conspirators named in the indictment charging petitioner with conspiracy, Robert Eugene Yungen and John Clem Hoagland, pleaded guilty prior to trial, and Yungen testified as a government witness.

The evidence showed that pursuant to a scheme to steal shipments of rolled steel from the Youngstown Sheet & Tube Company of East Chicago, Indiana, co-defendant Yungen, a truck driver, picked up a truckload of steel from the Youngstown plant that was destined for a General Electric facility in Louisville, Kentucky (Tr. 39). Rather than take the consignment to its designated destination, however, Yungen met with one Gene Kuyrkendall at a bar on the highway. Kuyrkendall called petitioner to inform him that a contraband shipment was available for purchase. Yungen then drove the steel to the Kedvale Steel Company in Chicago; Kuyrkendall followed in his car. Upon arrival in Chicago, Yungen unloaded the steel and departed, after which petitioner appeared and paid Kuyrkendall $1,500 for the goods (Tr. 41-43, 114). A few days earlier, Yungen and Kuyrkendall had delivered another stolen shipment, on which occasion Yungen met personally with petitioner (Tr. 42-43).

Kuyrkendall had previously made approximately twelve such deliveries of stolen steel to petitioner (Tr. 102). During the transaction that was the subject of the indictment in this case, however, Kuyrkendall was secretly cooperating with the F.B.I., having been arrested and charged in connection with another theft from interstate commerce (Tr. 116). In testifying at petitioner's trial in this case, Kuyrkendall related that he had disclosed to petitioner during one of his previous deliveries that the thefts were facilitated through the cooperation of a shipment clerk at the General Electric facility (co-conspirator Hoagland), who would certify on company shipping documents that the purloined steel was actually delivered (Tr. 108-109).

Petitioner contends that the indictment (Pet. App. A, pp. 7-9) insufficiently apprised him of the charges against him and that the proof adduced at trial varied impermissibly from the charge in the indictment. There is no merit to these contentions.

1. The test for determining the sufficiency of an indictment is whether it sufficiently apprises the accused of the charges against him that he can prepare his defense, and whether it describes the crimes with sufficient specificity to enable him to protect against double jeopardy. *Russell* v. *United States*, 369 U.S. 749, 763-764; *Gaither* v. *United States*, 413 F. 2d 1061, 1066 (C.A.D.C.). In the case of a conspiracy charge, "it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy." *Wong Tai* v. *United States*, 273 U.S. 77, 81.

The indictment in the instant case fully comports with these tests. Petitioner, co-defendants Yungen and Hoagland, and "diverse other persons" were specifically charged with agreeing to steal from interstate commerce two bundles of sheet steel valued in excess of $100, in violation of 18 U.S.C. 371 and 659. Further, it was alleged that this conspiracy was to be effectuated through Yungen driving a truckload of steel from the Youngstown Sheet and Tube Company to a destination designated by petitioner, which was other than the destination indicated on the shipping documents. Petitioner, the indictment stated, was to take delivery of the illicit goods, while co-defendant Hoagland would falsely certify on the shipping documents that the shipment of steel taken by Yungen was delivered to its

proper destination (Pet. App., pp. 7-9). This degree of specificity is more than sufficient under the holdings in *Russell* and *Wong Tai*, as it informed petitioner of the pending charges and protected him against double jeopardy.

2. In claiming a variance, petitioner cites the fact that at trial it was never shown that he dealt personally with Yungen or Hoagland during the transaction which formed the basis of the indictment. Thus it is argued that the proof did not demonstrate a conspiracy between petitioner and the co-conspirators named in the indictment, but one between petitioner and Kuyrkendall (Pet. 7-8). However, it is established that a conspirator need not be shown to have known the specific identities of all members of the alleged scheme. *Blumenthal* v. *United States*, 332 U.S. 539, 556-557. In this case, petitioner was clearly shown to have been aware of at least the participation of Hoagland and Yungen, if not their specific identities. Moreover, a few days prior to the theft specified in the indictment, Yungen had made another delivery, at which time he, as well as Kuyrkendall, personally met petitioner (Tr. 42-43). With respect to Hoagland, petitioner had inquired of Kuyrkendall where he obtained the stolen shipments, to which the latter had told him of "arrangements with a fellow in General Electric" (Tr. 108-109), a reference to Hoagland although not by name. Thus, it is clear that petitioner knew of the existence of Yungen and Hoagland, although he may not have known their specific identities and may have had no direct contact with Hoagland; no more is required. See *United States* v. *Varelli*, 407 F. 2d 735, 742 (C.A. 7).

3. Petitioner also complains that Kuyrkendall was not specifically named in the indictment as a co-conspirator and that there was another impermissible variance between indictment and proof because the indictment stated that Yungen had personally phoned petitioner and had later been paid by him, while the evidence at trial showed that it was Kuyrkendall who had phoned petitioner and received payment.

While Kuyrkendall was not personally named in the indictment, the charge did indicate that petitioner had conspired not only with Yungen and Hoagland, but also with "diverse other persons." The district court found that "Mr. Kuyrkendall was one of these 'other persons' referred to in the indictment. It is well settled that an indictment does not have to name all the conspirators known to the grand jury to be involved in the conspiracy" (Pet. App. A, p. 15). Moreover, as this Court noted in *Rogers* v. *United States,* 340 U.S. 367, 375: "* * * the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown." In any event, petitioner can claim no prejudice, for, as he admits in his petition (Pet. 10), the government revealed Kuyrkendall's identity prior to trial.[2]

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[2]Petitioner is thus inconsistent in complaining (Pet. 8) of the denial of his motion for a bill of particulars, which requested the identities of all conspirators involved. In fact, all parties stipulated prior to trial as to certain discovery procedures; included within the stipulation was the government's agreement to disclose the names of all conspirators involved, which disclosure (including Kuyrkendall's presence) was made. Upon the basis of this stipulation, petitioner's motion for a bill of particulars was denied.

With respect to the variance that the indictment stated that Yungen had dealt with petitioner but the proof showed that Kuyrkendall had done so, "[t]he true inquiry * * * is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger* v. *United States,* 295 U.S. 78, 82. The slight difference between the indictment and proof in this case cannot be said to constitute an alteration of the basic scheme of theft charged by the grand jury and did not prejudice petitioner's rights in any way; it is therefore at most a nonfatal variance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

DOJ-1974-10